right to the document but he had suffered no special damage through the denial of his right. It was a document which he was entitled to receive every pay day. The defence among other things alleged that the defendant was not bound to deliver this document. Damages would only have been nominal and would not have been appropriate. It was itself an action for the recovery of property namely the document on each and every pay day.

In the second case it was the defendants which withdrew the defence, not the plaintiffs who withdrew the claim. A public body demanded an illegal form to be filled up. Failure to complete the form (if valid) would have exposed the plaintiffs to a prosecution. The mere withdrawal of the defence in our particular case would not have secured the judicial condemnation of the document which was the object of the Suit.

In my opinion it was quite unnecessary to ask for a declaration and the Suit should have been brought in the District Court.

I therefore order that the plaintiffs do only recover such costs as they would have been entitled to if the proceedings had been brought in the District Court. The costs of the application are to be paid by the plaintiffs to the defendants.

Solicitors for the Plaintiffs—*Sisson & Delay.*

Solicitors for the Defendants—*Donaldson & Burkinshaw.*

[APPELLATE CIVIL JURISDICTION]

THOMAS, C.J. (F.M.S.),

MILLS & CUSSEN, JJ.

January 25, 1937.

IN THE ESTATE OF HAMEED NACHIAL alias HAMEED NACHIA OTHERWISE SPELT HAMEED NATCHIA DECEASED.

[SINGAPORE CIVIL APPEALS Nos. 2 & 3 of 1936].

Practice—grant of probate—passing over executor—Probate & Administration Ordinance, 1934, S. 54.

A testator died on May 30, 1935, leaving a will whereby he appointed A.H.M. and M.M. executors thereof. A period of more than six months elapsed during which there had been no application for probate. On March 5, 1936, the Solicitor General filed a petition praying for grant of letters of administration with will annexed to be made to the British Malaya Trustee & Executor Co., Ltd. On the following day a further petition was filed by A.H.M. praying that probate of the will be granted to him leave being reserved to the other of the executors to come in and prove the same.

Held, by the Court of Appeal, Thomas, C.J. (F.M.S.) and Cussen, J. (Mills, J., dissenting), upholding the decision of Whitley, Ag.C.J., reported in (1936) 5 M.L.J. 151, that the executor lost his absolute right to appointment by reason of his neglect within six months after the death of the testator to make an application for probate.

Held further, that the Court could pass over an executor on proper grounds and that such grounds existed in this case,

Per Cussen, J. The position of an executor, even when he has brought himself within the authority of Section 54, must still be considered. He cannot be passed over arbitrarily; there is not an open, free choice as between him and any other applicant. There must be reasonable grounds, judicially considered, for passing him over in favour of the Official Assignee or any other person.

APPEAL.

Walters for the Solicitor General (Respondent).

E. A. Stevens for three infant beneficiaries.

Batishill for Abdul Hameed Maricar (Appellant).

Cur. Ad. Vult.

THOMAS, C.J. (F.M.S.)—Hameed Natchial by her Will dated the 21st of February 1933 appointed Abdul Hamid Maricar and Mahamood Maricar to be her executors. She died on the 30th of May 1935.

Prior to the 5th of March 1936 no petition for probate had been filed either by the executors or by any other person. A period of over six months had therefore elapsed during which there had been no application for probate. On the 5th March 1936 the then Solicitor General filed a petition to which a photographic copy of the said Will was attached, praying that letters of administration should be granted to the British Malaya Trustee and Executor Company Limited.

On the 6th day of March 1936 Abdul Hameed Maricar filed a petition for probate. The delay for this application for probate by Abdul Hameed Maricar is explained by the statement that he was residing in India from the date of the death of the testator until the middle of January 1936.

The learned trial Judge, for the reasons given in his judgment, refused the petition for probate by Abdul Hameed Maricar, and allowed the petition of the Solicitor General, Straits Settlements, and ordered that letters of administration with the Will annexed should issue to the British Malaya Trustee and Executor Co., Ltd. From that judgment Abdul Hameed Maricar appeals.

At the appeal it was argued on behalf of the appellant that the Court must consider the petition of the executor first, and until that was disposed of could not consider the petition of the Solicitor General at all; and in considering the petition of the executor the Court could not refuse to grant probate on the ground of delay only, that not being one of the Common Law grounds for passing over an executor.

In the Straits Settlements there is an Ordinance (Cap. 51) dealing with probate and administration. Section 7 of this Ordinance provides that probate may be granted to any executor appointed by a Will. Sections 20 and 21 make provision in the case of infants and lunatics.

So far the position in the Straits Settlements is identical with the position in England. The language contained in *Mortimer* on Probate, 2nd edition, page 209, would therefore apply equally in the Straits Settlements as in England.

In England, by the Court of Probate Act, 1857 (since repealed), certain exceptions were introduced. The language of that Act has not been reproduced in the Probate and Administration Ordinance; but in section 54 provision has been made for a grant being made to the Official Assignee or to other fit person in cases where there has been delay on the part of the executor in filing his petition. This section replaces section 857 of the old Civil Procedure Code.

Section 857 of the Civil Procedure Code was divided into two parts, and seemingly thereby a distinction was drawn between cases where there had been delay and cases where there was an apprehension of waste. In the latter event there can be no doubt that the executor could be passed over; in the former case the Court of Appeal has held that the petition by the executor for probate must be first disposed of (See *In the Estate of Vavena Katha Pillay Marican*, 3 Malayan Law Journal, page 205). With the knowledge of the existence of that decision, the Legislature amended section 857 of the Civil Procedure Code, when it became section 54 of the Probate and Administration Ordinance. There is no longer a division into two sub-sections but there are five cases (a,b,c,d & e) in all of which the Court has the same powers. It can hardly now be urged that whereas the Court need not first dispose of the executor's petition under (d), it must do so under (a), (b), (c) and (e).

All these grounds are placed on an equal footing, all are grounds in respect of which an executor may be passed over in favour of the Official Assignee or of such other person as the Court thinks fit.

I do not wish to be considered as saying that the petition of the executor should not be considered at all. It would be right for the Court to consider it, for in spite of everything which may be advanced against him, the Court may yet come to the conclusion that he is a person fit to be appointed. But I do wish to emphasize that the absolute right to appointment has been lost when the application comes within any of the cases provided for by section 54.

The law in the Straits Settlements is passed to meet the requirements of those living and carrying on business in the Colony, and it does not necessarily follow the legislation of any other country. Just as in England it was deemed advisable to pass into law the Act of 1857 allowing certain exceptions to the general rule, so in the Straits Settlements it has been deemed advisable to provide for certain exceptions. These are indubitably wider than those in England, but when it must be remembered how very diverse are the various peoples residing in the Colony; how frequently their interests are not confined to the Colony but are extended to China on the one side, to India and Ceylon on the other; and that even where these people have a certain degree of education, they are frequently ignorant of the English language and the law of the Colony.

I am, therefore, satisfied that the interpretation placed on section 857 of the Civil Procedure Code is not applicable to section 54 of the present Probate and Administration Ordinance, and that the conclusion to which the learned trial Judge arrived was right.

As I have said, there is nothing to prevent the consideration of the executor as a fit person for appointment. After reading the reasons given by the learned trial Judge I am satisfied that he exercised his discretion properly and was justified in refusing to appoint the present appellant. The appeals, therefore, fail. They are dismissed accordingly.

The costs of the Solicitor General as between solicitor and client will come out of the estate. The costs of the infants cited as between solicitor and client will also come out of the estate. The appellant must pay the costs of the appeal as between party and party. These may be deducted from his share of the estate. Any sum paid into the Court by the appellant to be paid out in reduction *pro tanto* of the costs due to the Solicitor General, and if in excess of such sum then balance to be paid in reduction *pro tanto* of the costs of the infants cited.

MILLS, J.—The deceased by her Will dated the 21st February, 1931, appointed her grandsons Abdul Hameed Maricar and Mahamood Maricar to be her executors.

She died on the 30th May, 1935.

On the 5th March, 1936, the Solicitor-General petitioned the Court to grant letters of administration with the Will annexed, to the British Malaya Trustee and Executor Company Limited.

On the 6th March, 1936, Abdul Hameed Maricar, one of the executors, petitioned the Court to grant Probate of the Will to himself, with leave to Mahamood Maricar, the other executor, to come in and prove the will.

Three infant beneficiaries supported the petition of the Solicitor-General. The Petitions were heard together by Whitley, J. who gave judgment on the 14th May, 1936. The learned Judge wrote his grounds of judgment, these are dated the 3rd June, 1936.

He expressed the following views as to the law:—

1. *prima facie* the executor is entitled to the grant of probate;

2. after 6 months from the date of death any person may apply for Letters of Administration under Section 54 of the Probate and Administration Ordinance (Chapter 51).
3. if the executor fails to apply for probate within 6 months from the date of death, he forfeits his right to priority, and no person has any right to a grant;
4. under Section 54 the Court has unfettered discretion—to be exercised judicially—to grant Letters of Administration to any person, irrespective of any rule of priority,

The learned Judge, holding that he had unfettered discretion and finding as a fact that the executor was unsuitable, refused his petition, and granted that of the Solicitor-General. The executor appeals against the refusal and the grant. Counsel for the appellant put forward several grounds in support of his appeal.

The first ground related to matters of procedure: he said that the Solicitor-General's petition was irregular because the Will was not annexed and because the executor was not cited: in fact, a photographic copy of the will was annexed to the petition, and at a later stage the executor was cited by order of Court; in my opinion, the executor was not prejudiced by the irregularities of procedure: procedure is a handmaid to the work of justice, and I do not think it would be right to allow the appeal on this ground.

The second ground related to the jurisdiction of the Court.

For the appellant it was argued:—

(a) that on a proper interpretation of section 7 (i) of the Ordinance the Court must grant probate to an executor unless he suffers from a legal disability:
(b) this legal disability must be one recognised and allowed by the common law [*Smethurst* v. *Tomlin and Banks*, (1861) 164 English Reports at page 949]:
(c) this common law rule is still in force in the Colony:
(d) the Court ought to hear and determine the executor's petition independently of Section 54: that petition must be disposed of first (*In the Estate of Vavena Katha Pillay* Marican, deceased, 3 Malayan Law Journal p.205): It is only after the executor's petition has been refused that Section 54 comes into operation.

Counsel for the respondents contended:—

as to (a), that the word "may" in Section 7 (i) gives a discretion to the Court:
as to (b), that the decision of the Court of Appeal in *V. K. P. Marican's* case (*supra*) suggests that dilatoriness and unsuitability are grounds for passing over the executor:
as to (c), that the statute law of the Colony has superseded the common law:
as to (d), that the Court was right in determining the executor's petition under Section 54.

My view on these points is as follows:—

as to (a): the answer to the question whether "may" is to be interpreted as "must" depends on the intention of the legislature to be ascertained by a consideration of the Ordinance as a whole: since in Sections 6, 12, 13, 20 and 21 it is expressly stated when probate is not to be granted to an executor, it appears to me that the legislature intended that probate is to be granted to the executor except in cases falling within the scope of those sections:

as to (b): the words used by Huggard, C.J., do suggest that dilatoriness and unsuitability are factors which are to be taken into account; he may mean to say that even if they are factors, they have not been established in the case before the Court; but I think the former interpretation is more natural and probable: if that was the view of the Court of Appeal in that case, I am compelled respectfully and reluctantly to express the opinion that this Court ought now to overrule that decision; no attempt has been made to demonstrate that dilatoriness or unsuitability is a factor either under the common law, or the Charters, or the English or Indian Acts applicable to the Colony, or the Ordinances of the Straits Settlements:

as to (c): in my opinion the contention of the appellant is correct; we must take it that *Smethurst's* case accurately states the common law rule; if so, that rule became the law of the Colony by virtue of the Charter of 1826; and the executor must retain his common law right unless it has been taken away from him by statutory provision either expressed or necessarily to be implied; I have examined the Charters, the Indian Acts and the local Ordinances, but I have been unable to find any provision taking away the executor's right; the English Court of Probate Act, 1857, does not apply to the Colony:

as to (d): I have no doubt that if the Court determines the executor's application by virtue of the jurisdiction conferred by section 54, it has unfettered discretion, to be exercised judicially, to grant letters of administration to such person as the Court thinks fit: the point in issue is whether the Court determines the executor's petition .

(a) under section 54.
or (b) independently of section 54:

that point falls to be decided on an exact interpretation of section 54:

the material portions are as follows:—

" In the following cases, namely:—

(a) where, after the expiration of six months from the death of a deceased person no application has been made for probate or letters of administration to his estate: or

(b) where any such application, though made within the said six months, has not within that period been proceeded with or has been withdrawn or refused; .....

Letters of administration with or without the will annexed may be granted to the Official Assignee, or to such other person as the Court thinks fit ":

in the present case it is clear that the jurisdiction does not arise under clause (b), since

(i) the executor had not refrained from proceeding with his application,

(ii) the executor had not withdrawn his application,

(iii) the Court had not refused the executor's application independently of section 54, but if the Court had done so, such refusal was, in my view unjustified since it was based on a disability not recognised and allowed by the common law:

the jurisdiction arises, then if at all, under clause (a): there are two possible interpretations of clause (a): Interpretation A. The juristiction arises if

(i) a period of six months from death has expired, and

(ii) no application for probate has been made at the time of hearing:

according to this interpretation, the words "has been made" refer to the time of hearing and not to the moment when the period of six months expires;

Example.—The period of six months expires at 4 p.m. on 30th June, no application has been made before that moment; an application for probate is made at 10 a.m. on 1st July;
the Court hears the matter at 2 p.m. on 1st July;
the jurisdiction does not arise because an application for probate has been made before 2 p.m. on 1st July:

Interpretation B. The jurisdiction arises if

(i) a period of six months from death has expired,
and

(ii) no application for probate has been made at the moment of such expiry;

according to this interpretation, the words "has been made" refer to the moment when the period of six months expired, and not to the time of hearing.

Example.—The period of six months expires at 4 p.m. on 30th June; no application has been made before that moment; an application for probate is made at 10 a.m. on 1st July; the Court hears the matter at 2 p.m. on 1st July; the jurisdiction arises because no application for probate has been made before 4 p.m. on 30th June;

in my opinion the former interpretation is correct: my reasons are as follows:—

i. it is the natural interpretation;
if the Legislature contemplated the making of the application within the period of six months, it would be more natural, in my opinion, to use the expression " on the expiration " or " at the expiration" the use of the expression " after the expiration " indicates, in my opinion, that the Legislature contemplated the lapse of a certain period of time between the expiration of the six months and the making of the application;

ii. It is the logical interpretation;
what might be called the " sovereign words " of the section are the words " may be granted," in my opinion it is logical that the subjunctive clause " where.....no application has been made " should be referred to the point of time when those ' sovereign words ' come into operation;

iii. it is the interpretation indicated by the Legislature; in clause (b) the Legislature uses the expression " has not within that period been proceeded with " if in clause (a) the Legislature had meant " no application has within that period been made," it would, in my opinion, have inserted the words " within that period "; the fact that it has not inserted these words indicates, in my opinion that the Legislature did not refer to such applications, only as were made within the period of six months;

in the present case the executor made his application for probate before the Court commenced to hear the matter: my conclusion, therefore, is that the jurisdiction conferred by section 54, never arose.

If I correctly understand the decision in *V. K. P. Marican's* case (*supra*), the Court of Appeal held that the executor's application must first be determined independently of section 54; in my respectful submission that decision is correct.

The third ground related to the legitimate grounds for passing over an executor.

This subject overlaps the question of jurisdiction, and I need not add to what I have said above on that matter.

The fourth ground related to the interest of the Solicitor-General.

Counsel for the appellant contended that the Solicitor-General had no interest to oppose the executor's petition since the Crown was not a creditor of the deceased but only of the deceased person's estate.

Contra, it was argued that the Crown was sufficiently interested and reference was made to *Dymond*, Estate Duties, 7th edition p. 199, from which it would seem that in England the Crown may apply as a creditor by reason of statutory provisions.

In my opinion this ground of appeal fails: the right of a creditor to a grant depends on the practice of the Court, and there is no reason why this Court should not formulate its own practice.

In England the fact that the applicant was not a creditor of the deceased did not debar him from obtaining a grant in a proper case: for instance, a creditor's grant might be made to a person who has paid the funeral expenses or to an undertaker who has paid expenses: see *Halsbury's* Laws of England. Second Edition. Vol. 14. Page 245, paragraph 423.

The last ground related to the evidence of unsuitability. Counsel for the appellant contended that the trial Judge was not justified in branding the executor as careless, incompetent and negligent, or as probably antagonistic.

This is purely a question of fact.

The learned Judge has set out in his grounds of judgment the reasons why he concluded that there was good cause for passing over the executor; *inter alia*, he based his decision on the executor's demeanour in the witness box.

The learned Judge has some 15 years' experience in Malaya, and I should require very cogent grounds for feeling justified in interfering with his conclusions: all that is necessary for me to say is that I see no reason for thinking that his estimate of the executor was either unreasonable or perverse.

On the case as a whole, my opinion is that the appeal ought to succeed on the ground that the learned Judge was wrong in passing over the executor on account of a disability not recognised and allowed by the Common Law.

As to costs: I can see no reason for departing from the order made in *V. K. P. Marican's* case (*supra*), namely, that the appellant and respondents should have the costs of this appeal, to be taxed as between solicitor and client and paid out of the estate: the appellant ought also to recover any costs paid in respect of the proceedings in the lower Court, and ought also to receive the deposit, if any, which he has made in respect of this appeal.

CUSSEN, J.—The first question arising for determination in this appeal is as to the proper construction of section 54 (a) and (b) of the Probate and Administration Ordinance. This Ordinance came into force on 1st January 1935.

Before that date the law relating to the Grant of Probate and Letters of Administration was contained in Chapters XL to XLV of the Civil Procedure Code. And it is clear that section 857 of the Code is replaced in the present ordinance by section 54; whether and, if so, how and to what extent it is also thereby amended is a question to be considered.

Now section 857 of the Code was examined by the Court of Appeal in Singapore Civil Appeal No. 1 of 1934, *In the Estate of V. P. K. Marican*, 3 M.L.J. 205, the Court being divided as to the correct interpretation of the section—at any rate of that part of it which corresponds to the present section 54 (a) & (b), and which is relevant to this appeal.

The question then arises—assuming that, notwithstanding the differences in language and structure, there is no substantial difference between the two sections—is this Court bound by the decision—a majority one—in that case.

I am of opinion that this Court is not so bound but that it is proper and incumbent upon it to decide otherwise in any case where it considers without doubt that the former decision was erroneous, *Khoo Keat Lock* v. *H. Yusop*, S.S.L.R. 1929 at p. 214. And the freedom of this Court in this respect is all the more evident when, as in this case, we are dealing with a new law which amends and re-enacts the old law.

Besides the primary duty of examining the present law as it is written, we are entitled to look at the law as it was, in order that, from examination of the changes in form and expression we may correctly determine the true meaning of the law as it now is.

Section 857 of the Code reads as follows:—

> *"If after the expiration of six months from the death of the deceased there is no application for probate of his will (if any) or for letters of administration to his estate and effects or if any such application has been withdrawn or not proceeded with or refused or if a person having six months from the death of the deceased entitled himself to a grant of probate or letters of administration neglects within one month after having so entitled himself to give such security as may be required of him by law or by the practice of the Court the Court may grant to the Official Assignee or to such other person as the Court shall think fit letters of administration with the Will annexed or otherwise as the case may require."*

The majority decision of the Court in the case referred to interpreted this as meaning that the jurisdiction under the first clause only arises if there is no application for probate or letters of administration pending, not at the expiration of the six months period, but at any time, subsequent to that period, whenever it might be, when

the Court has to consider making a grant under this section.

The dissenting judgment (that of Thomas C.J., F.M.S.) held that the meaning of this part of the section was that, once the period of six months had expired without there being any application, the jurisdiction came into operation.

In this appeal these two interpretations are applied to section 54 of the present law by the Appellant and Respondent respectively.

Now the first thing to do is to examine this section by itself and in itself. The section reads:—

"In the following cases, namely:—

(a) where, after the expiration of six months from the death of a deceased person, no application has been made for probate or letters of administration to his estate; or

(b) where any such application, though made within the said six months, has not within that period been proceeded with, or has been withdrawn or refused; or

(c) where any person, who has received a grant of letters of administration with or without the Will annexed, neglects within one month of the date of such grant to give such security as he is lawfully required to furnish; or

(d) where a receiver may be appointed under section 36, but it appears that such appointment would not be a sufficient protection for the estate; or

(e) where an administrator has failed to extract the grant of letters of administration;

letters of administration with or without the Will annexed may be granted to the Official Assignee, or to such other person as the Court thinks fit."

It will be sufficient, I think, to consider paragraphs (a) and (b) of the section.

Now the meaning of these two paragraphs is, in my opinion, quite clear—a period of six months from the death is taken and the two possible cases are provided for (a) where no application has been made (i.e. within the period) and (b) where an application has been made (i.e. within the period). This, in my opinion, is the meaning expressed, quite clearly and without ambiguity.

The substitution of the words "no application has been made" for the words (in section 857 of the Code) "there is no application....." appears also to negative the alternative interpretation.

The language of section 54(b), in particular, seems to indicate, when compared with the corresponding provision in section 857 of the Code, a definite intention to remove any possible ambiguity as to the meaning and this is effected by the introduction of the words "though made within the said six months, has not *within that period* been proceeded with....."

In my opinion this clearly confines section 54(b) to applications made within the six months period.

The special jurisdiction in section 54 therefore arises through (a) failure to make an application within the six months period or (b) failure to proceed with an application within the six months period or (c) when an application made within the six months period is withdrawn or refused (i.e. at any time whether before or after the expiration of the six months period)

If the alternative interpretation for section 54(a) is adopted it leads to the following inconsistent result when considered with section 54(b):—

An executor who neglects to make application for probate within the six months period does not thereby suffer any disadvantage but can, at any time, up to and at the time when the Official Assignee or some other person makes application (and it is argued that he (the Executor) must be cited) come forward and claim a grant; whereas an executor who applies within the six months period but does not proceed with his application *within that period* loses his favoured position at the expiration of the period and his right to a grant becomes subject to the discretion given to the Court by this section.

I am, therefore, of opinion that although the language of the old law (section 857 Code) may have permitted of two possible interpretations, the language of the present law is clear and unambiguous.

Nor, I may add, even if the language of section 54(a) & (b) were susceptible of the alternative interpretations claimed for it, is there anything so unreasonable or repugnant or unjust in the result of the interpretation I have adopted as would justify resorting to an interpretation which is, at any rate, less logical and consistent.

The subjection of the rights of the executor to the discretion conferred on the Court by this section cannot be considered such a result.

It is perhaps permissible in this connection to point to the corresponding provision of the Probate and Administration Enactment of the Federated Malay States (section 29, Vol. I of the *Gibson* edition, page 515) which provides that:—

> "In any case where six months shall have elapsed after the death of such intestate or testator without any application for letters of administration or for probate being made by any person, it shall be the

duty of the Official Administrator so to apply, unless he is satisfied that there is good and sufficient cause for the delay.

* * * * *

(iii) On application being made by the Official Administrator.....letters of administration *shall* be granted to the Official Administrator accordingly, unless in any particular case the Court for sufficient reason directs that letters of administration be granted to a person other than the Official Administrator."

This is of course not an authority here but it is, I think, relevant to refer to it when it is suggested that the results of the interpretation of section 54 which I have adopted are either unreasonable or so unjust that the legislature must not be taken to have intended such if any other interpretation is possible.

It remains only to consider how this discretion should be exercised and its exercise in this particular case. I agree with the learned Judge that this discretion is quite unfettered save that of course it must be exercised judicially.

And, in my opinion, the position of the executor, even when he has brought himself within the authority of this section, must still be considered. He cannot be passed over arbitrarily; there is not an open, free choice as between him and the other applicants or persons under consideration. There must be reasonable grounds, judicially considered, for passing him over in favour of the Official Assignee or any other person.

The paramount consideration is always the interests of the Trusts of the Will. If there is evidence from which the Court, in its discretion, may properly conclude that it would be undesirable and unsafe to entrust the administration of the Estate to the Executor, then the executor may be passed over.

It may also be pointed out that it appears from the judgment of Huggard, C.J. in the case referred to that he considered that, where there is jurisdiction under section 54, unsuitability or dilatoriness are grounds on which an executor may be passed over.

In this present case the learned Judge was satisfied "that there are ample reasons for passing the executor over, that the interests of the beneficiaries would be gravely imperilled if he were given control of the estate," that it appears to him that the executor is likely to show carelessness, incompetence and negligence which would result in "appalling loss and hardship" to the beneficiaries; and that it appeared probable that his interests would be antagonistic to those of the infant beneficiaries.

It is one of the grounds of appeal that the evidence does not support these findings of fact or any of them.

Now the evidence on which the learned Judge arrived at these conclusions as regards the executor is:—

(a) his demeanour and behaviour as a witness—"He was a most unsatisfactory witness continually fencing with questions."

(b) that he "offered no explanation whatsoever as to why he did nothing from May 1935, when the testator died, until January 1936, when he came to Singapore" (and it must be remembered that it is the failure to act or to continue to act in the six months period that gives rise to the jurisdiction under this section).

(c) his saying that he did not know that Fatima was his father's wife; whereas Mr. Tongue's evidence showed that he (the appellant) and the rest of the family in India were well aware that these infants were entitled to benefit under the will.

The evidence of Mr. Tongue as regards the contents of the correspondence between the deceased's attorneys in Singapore and their relatives, including the appellant, in India, is also proof of the hostility of the appellant and other members of the Indian branch of the family to these Malayan infant beneficiaries.

As regards (a) above this is, I need hardly say, a matter peculiarly within the province of the Judge who saw and heard the witness; as regards (b) I have examined the record and I cannot find that any explanation was offered save that he was in India; as regards (c) which is, in my opinion the most serious of the reasons for passing over the executor I am of opinion that there was sufficient evidence before the learned Judge on which to arrive at his conclusion in this matter.

That being so it is not open to this Court to interfere with the exercise by the Judge of the discretion given to him.

I am of opinion, therefore, that the appeal should be dismissed.

The costs of the Solicitor General as between solicitor and client will come out of the estate. The costs of the infants cited as between solicitor and client will also come out of the estate. The appellant must pay the costs of the appeal as between party and party. These may be deducted from his share of the estate. Any sum paid into Court by the appellant to be paid out in reduction *pro tanto* of the costs due to the Solicitor General, and if in excess of such sum then balance to be paid in reduction *pro tanto* of the costs of the infants cited.

Solicitors for the Solicitor General—
Allen & Gleadhill.

Solicitors for Abdul Hameed Maricar—
Sisson & Delay.